

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

In the Matter of

Rulemaking to Amend Parts 1, 2, 21, and 25
 of the Commission's Rules to Redesignate
 the 27.5-29.5 GHz Frequency Band, to
 Reallocate the 29.5-30.0 GHz Frequency
 Band, to Establish Rules and Policies for
 Local Multipoint Distribution Service
 and for Fixed Satellite Services

CC Docket No 92-297

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 FEDERAL COMMUNICATIONS COMMISSION
 WASHINGTON, DC 20554

**JOINT COMMENTS OF SULLY BUTTES TELEPHONE COOPERATIVE, INC.
 AND GOLDEN WEST TELECOMMUNICATIONS COOPERATIVE, INC.**

Sully Buttes Telephone Cooperative, Inc. ("Sully Buttes") and Golden West
 Telecommunications Cooperative, Inc. ("Golden West") (collectively, the "Joint Commentors"),
 by their attorneys, hereby submit their comments to the *Sixth Notice of Proposed Rule Making* in
 the above-captioned docket.¹ In brief, the Joint Commentors believe that the Federal
 Communications Commission ("FCC" or "Commission") should allow the Local Multipoint
 Distribution Service ("LMDS") eligibility restriction² to sunset as scheduled on June 30, 2000.
 In the alternative, the Commission should allow this regulation to sunset so far as it applies to
 rural telephone companies and cooperatives that are seeking to provide advanced
 telecommunications services to their member/subscribers. Such a result is consistent with the
 intent of Congress, and policies adopted by the FCC in seeking to secure the benefits of
 advanced telecommunications services for high cost and rural areas.

¹ Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services, CC Docket 92-297, *Sixth Notice of Proposed Rule Making*, FCC 99-379 (rel. Dec. 13, 1999) ("Sixth NPRM").

² 47 C.F.R. § 101.1003.

BACKGROUND

The Joint Commentors are rural telephone cooperatives that provide local exchange telephone and other telecommunications services to their member/subscribers in different portions of the State of South Dakota. Each cooperative was a successful participant on its own in the FCC's first LMDS auction,³ and each has been exploring business arrangements with other rural carriers to develop a bundle of basic and advanced services that they can offer throughout regions where they have a long history of providing high-quality telecommunications service. However, efforts to come up with a suitable business structure have been complicated by the need to avoid eligibility issues which arise when one or more of the carriers has "significant overlap" with a particular BTA. Numerous business entities, each having different (and convoluted) ownership structures, may have to be created to account for the diverse local exchange and/or cable television holdings of these carriers – and many business economies that might otherwise be enjoyed by such a consortium will be lost. In some cases, potentially valuable business partners must forgo participation, hindering the chances for success of the LMDS project. To avoid such a result, and for reasons discussed below, Sully Buttes and Golden West believe that the LMDS eligibility restriction should be allowed to sunset on June 30, 2000. If for some reason the Commission should find that the public interest will be served by an extension of the eligibility restriction, the Joint Commentors respectfully submit that a "market dominance" standard should not apply to the analysis of rural markets, where rural telephone companies and cooperatives face a different economic paradigm and have demonstrated their willingness and ability to provide service in the public interest.

³ Sully Buttes participated in Auction No. 17 through its wholly-owned subsidiary, Venture Wireless, Inc. ("VWI") and was a successful bidder for A-Block LMDS licenses serving the Aberdeen and Huron, South Dakota BTAs as well as the Sioux City and Iowa City, Iowa BTAs. Golden West participated in Auction No. 17 through its wholly-owned subsidiary, GW Wireless, Inc. ("GWW") and was a successful bidder for A-Block LMDS licenses serving the Rapid City and Watertown, South Dakota BTAs.

I. THE LMDS ELIGIBILITY RESTRICTION SHOULD BE ALLOWED TO SUNSET, AS SCHEDULED, ON JUNE 30, 2000

The Joint Commentors believe that the LMDS eligibility restriction no longer serves the purpose for which it was intended and should be allowed to sunset, as scheduled, on June 30, 2000. Despite the fact that the service was first licensed in 1998, few (if any) commercial LMDS systems have been deployed to date and the service has had no impact on competition in the local exchange telephone and/or multi-channel video programming distribution (“MVPD”) markets. In sharp contrast, robust markets have emerged in the past two years for broadband wireless services that utilize 2 GHz MDS, 2.5 GHz MMDS and ITFS, 24 GHz and 39 GHz frequencies. None of these services is subject to ownership restrictions and each is providing competition to the LEC and/or MVPD market. As a result, the Commission should recognize that the “unique circumstances” surrounding the LMDS allocation are no longer relevant and the LMDS eligibility restriction should be allowed to sunset.

Section 101.1003 (a)(1) of the Commission’s rules provides that the LMDS eligibility restriction for incumbent LECs and incumbent cable companies

... shall terminate three years following June 30, 1997 unless the Commission extends its applicability based on a determination that incumbent LECs or incumbent cable companies continue to have substantial market power in the provision of local telephony or cable television services.

This ownership restriction was adopted by the FCC, and upheld by the United States Court of Appeals,⁴ at a time when LMDS was being viewed primarily as a vehicle for the provision of LEC and/or MVPD services. The restriction was justified because the LMDS allocation “provided the Commission with a rare opportunity to enable the creation of a facilities-based provider of local exchange services, MVPD services, broadband data services, or all of the

⁴ See Melcher v. FCC, 134 F.3d 1143 (D.C. Cir. 1998).

above.”⁵ However, in the years since the LMDS ownership restriction was promulgated, other broadband wireless services have grown tremendously. The “wireless cable” industry (2 GHz MDS, 2.5 GHz MMDS and ITFS) has undergone a “renaissance” of sorts as Sprint and WorldCom made strategic acquisitions of wireless cable licensees to compliment their wireline service offerings. Likewise, billion-dollar “startups” WinStar (39 GHz) and Teligent (24 GHz) have grown into significant local exchange and broadband access competitors. These companies are providing bundled voice and data services in a growing number of markets and can deploy their networks in a matter of just weeks. Auctions for the remaining 39 GHz and 24 GHz spectrum (in the form of market area licenses) are scheduled to begin this spring. The potential for LEC and MVPD competition from each of these wireless services -- which are not subject to ownership restrictions -- should not be discounted. Likewise, the Commission must not overlook the fact that mobile wireless services, such as cellular and broadband PCS, are being increasingly viewed by customers as a replacement for basic local telephone service. Leap Wireless is offering unlimited local calls for a low flat rate, through its Cricket PCS service. And Sprint PCS is now offering Internet data services that customers can access with their wireless handsets. An additional 30 MHz of spectrum will soon be made available for carriers in the 700 MHz band for third generation (“3G”) wireless services. Viewed in this context, the A-Block LMDS allocation can no longer be viewed as a “unique circumstance” which justifies an eligibility restriction. The Commission should therefore permit the rule to sunset on June 30, 2000.

II. THE COMMISSION SHOULD ALLOW THE LMDS OWNERSHIP RESTRICTION TO SUNSET FOR RURAL TELEPHONE COMPANIES AND COOPERATIVES

If the FCC does not allow the LMDS ownership restriction to sunset for all carriers, the Commission should at least recognize economic realities and allow the ownership restriction to sunset for rural telephone companies and cooperatives on June 30, 2000. The anti-competitive

⁵ *Sixth NPRM* at 2.

concerns which formed the basis for promulgating the LMDS eligibility restriction in the first place are not applicable in markets that are served by rural telephone companies and member-owned telephone cooperatives. Moreover, the Commission has recognized that the economics of providing service in rural areas are much different and that anti-competitive concerns are outweighed by the desire to secure the benefits of modern telecommunications services for rural areas.

By their nature, rural telephone cooperatives like Sully Buttes and Golden West exist in areas where no telephone company could foresee an economic justification to extend its service, given the rural nature of the community. Thus, the residents of the community were forced to form their own telephone company, through the cooperative mechanism. The member/owners of a cooperative are also its customers. Therefore, the concern which forms the basis for the LMDS ownership restriction -- that the telephone company will behave in an anti-competitive manner -- does not apply. The customer/owners of the cooperative will not let themselves be deprived of the benefits of LMDS by suppressing development of this new service. Instead, the cooperative will be able to use this new wireless service to provide both basic and advanced telecommunications services using the most efficient mix of technologies. If the Commission finds that market conditions require any extension of the LMDS ownership restriction, it must recognize that failure to allow the rule to sunset in areas served by rural carriers will only further delay the provision of LMDS to rural America.

In a *Report and Order* that was adopted recently, the Commission evaluated competitive market conditions and the continuing need for its Commercial Mobile Radio Services ("CMRS") spectrum cap.⁶ While the Commission found that the 45 MHz spectrum cap remained necessary

⁶ See 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket 98-205, *Report and Order*, FCC 99-224, (rel. Sep. 21, 1999) ("*CMRS Spectrum Cap Order*").

to protect the development of competition in most markets, it acknowledged that the economics of providing telecommunications services in rural areas are different and that this difference justified raising the cap to 55 MHz in Rural Service Areas ("RSAs").⁷ In particular, the Commission found that the ability for rural carriers to take advantage of partnering opportunities, and resulting economies of scope, would help promote competition and facilitate the introduction of broadband services to rural areas.⁸ The Joint Commentors respectfully submit that very same circumstances that the Commission cited to justify relaxation of the CMRS spectrum cap in rural markets should apply when evaluating the necessity for extending the LMDS eligibility restriction. The ability for rural LMDS licensees to enter into partnerships and joint ventures with rural LECs and cable providers, and to fashion cost-sharing arrangements, will largely determine whether LMDS spectrum will be used to provide service or whether it will lie fallow in underserved markets.⁹

The Joint Commentors have met with other rural carriers in an effort to design a local exchange/broadband access product that will be affordable in rural areas. The keys to this affordability are (1) the utilization of existing infrastructure of other rural carriers within the Joint Commentors' respective LMDS service areas, and (2) assembling a "critical mass" of subscribers to justify network buildout and create the possibility for volume discounts for network and customer premises equipment. In this regard, the Joint Commentors have met with numerous vendors (with substantial assistance of the National Telephone Cooperative Association) to secure affordable equipment for rural business and residential applications. Most

⁷ *CMRS Spectrum Cap Order* at para. 84.

⁸ *Id.*

⁹ The Joint Commentors note that the Commission has recently recognized that rural telephone companies should be treated as small businesses rather than dominant carriers, for purposes of the Regulatory Flexibility Act (5 U.S.C. § 603). See *Third Report and Order CC Docket No. 98-147* and *Fourth Report and Order in CC Docket No. 96-98*, FCC 99-355 (*rel.* December 9, 1999) at D-5, D-6. Allowing the LMDS eligibility rule to sunset would be consistent with this common-sense finding.

vendors at this stage are focused on business applications in urban environments. However, because of the needs of their rural subscribers, Sully Buttes and Golden West are dedicated to providing services to residential customers, as well. Unfortunately, equipment vendors have not been willing (or able) to provide reasonable price terms unless and until these carriers can deliver a large volume of potential customers. The Joint Commentors have determined that this can only be achieved in their rural areas by affiliating with other rural carriers and capitalizing on their existing infrastructure (including fiber rings) and good customer relationships. The continued existence of the LMDS eligibility restriction threatens the ability of the Joint Commentors to bring this alliance together, because the potential partners with any interest in serving rural communities are local exchange telephone and/or cable television companies with service areas that fall within, or partially overlap, the LMDS market area.

III. SUNSET OF THE LMDS ELIGIBILITY RESTRICTION FOR RURAL CARRIERS IS CONSISTENT WITH THE COMMISSION'S STATUTORY OBLIGATION TO ENCOURAGE THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY

As described above, the LMDS eligibility restriction is currently acting as a regulatory barrier which prevents rural carriers from entering into the most logical business arrangements for the provision of advance telecommunications (*i.e.*, "broadband") services. Therefore, by permitting this rule to sunset on April 30, 2000 as to rural carriers, the Commission will eliminate regulatory barriers and encourage broadband deployment consistent with the intent of Congress.

With the advent of new technologies and a wide variety of innovative service offerings, the demand for broadband capability is growing at a very rapid pace. No place is this more apparent than in rural communities, where the availability of broadband service brings the promise of education through distance learning, access to health care services through telemedicine, and economic development through the emergence of e-commerce technologies.

Unless rural communities have access to broadband, rural citizens are left hopelessly behind and there are fewer incentives for rural youth to remain a part of their community. Congress understood these needs of rural America when it promulgated the Telecommunications Act of 1996 (the “1996 Act”) and it instructed the Commission to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.¹⁰ Section 706(b) of the 1996 Act directs the Commission to initiate, within 30 months, a notice of inquiry concerning the availability of advanced telecommunications capability. If the Commission’s determination is negative, the FCC must take “immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹¹

The Joint Commentors urge the Commission to recognize that the near-term availability of an LMDS service offering in rural areas *will depend entirely on whether rural telephone companies and cooperatives can participate freely in the service*. As demonstrated above, the LMDS eligibility restriction has hampered the ability of Sully Buttes and Golden West to enter into the business relationships that are necessary to make this advanced telecommunications capability an affordable solution for rural America. The Joint Commentors have no doubt that other rural LMDS licensees will come to the same conclusion, if they haven’t already. Therefore, consistent with its obligation under Section 706 of the 1996 Act, the Commission *must take immediate action* to accelerate the deployment of rural LMDS by allowing the eligibility restriction of Rule Section 101.1003 expire as scheduled on June 30, 2000. Any further delay in this regard will only result in harm to rural citizens and the squandering of a

¹⁰ The principal section of the 1996 Act concerning advanced telecommunications capability is Section 706, Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153.

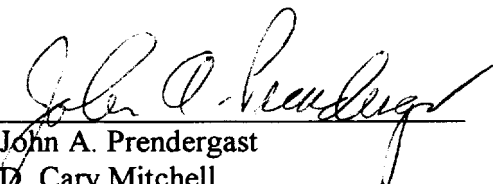
¹¹ See 1996 Act at § 706 (b)

valuable resource that should be available to rural carriers and the customers they are dedicated to serve.

WHEREFORE, good cause being shown, the Joint Commentors respectfully request that the Commission allow the LMDS eligibility restriction to sunset, as scheduled, on April 30, 2000. In the alternative, the Joint Commentors request that Commission allow the LMDS eligibility restriction sunset on this date for rural telephone companies and cooperatives.

Respectfully Submitted,

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Dated: January 21, 2000

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